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**COMMENTARY**

**“CHILLING JUDICIAL INDEPENDENCE”—  
THE CALIFORNIA EXPERIENCE**

STANLEY MOSK\*

*Ill blows the wind that profits nobody.\*\**

The recent winds have indeed profited the Supreme Court of California. The Ayatollah Khomeini, the Russian invasion of Afghanistan, and Woodward and Armstrong<sup>1</sup> have driven us off the front pages. The court, however, shall return to national attention in the near future.<sup>2</sup>

The Supreme Court of California was catapulted into the nation's headlines after allegations surfaced that justices may have manipulated the electoral system for their own political gain. During the 1978 campaign, and particularly on election eve, unfavorable newspaper articles appeared alleging that politically sensitive cases<sup>3</sup> were held up, not to be filed until after the election at

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\* Associate Justice, California Supreme Court. This article is adapted from a lecture given during the Administrative Law Judges' Symposium, February 15, 1980, in Washington, D.C.

\*\* SHAKESPEARE, Henry VI, Part 3, IIv.

1. R. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

2. See text accompanying notes 29-33 *infra*.

3. Particularly significant is the opinion in *People v. Tanner*, 23 Cal. 3d 16, 587 P.2d 1112, 151 Cal. Rptr. 299 (1978) (*en banc*), in which a majority of the supreme court affirmed a trial judge's decision to grant probation, notwithstanding a statute mandating that probation not be granted to persons using firearms during specified crimes. Chief Justice Bird concurred on the ground that the statute was un-

which Chief Justice Rose Bird was a candidate for retention.<sup>4</sup> In response, the Chief Justice unilaterally took the unprecedented step of requesting "an impartial and complete investigation by the Commission on Judicial Performance."<sup>5</sup>

The Commission, never before cast into the limelight, responded with enthusiasm and, through appropriate channels, had its rules changed to provide for public investigative hearings.<sup>6</sup> Thus, television and radio coverage were welcomed. Such open proceedings, prior to actual disciplinary recommendations to the supreme court itself, were clearly contrary to state constitutional requirements of confidentiality.<sup>7</sup> Reason and restraint, however, were swept aside by fear and emotion.

The Commission, in conducting the investigation, discarded traditional safeguards in favor of unrestrained attempts to gather relevant and even irrelevant information. For example, the Commission declared itself not bound by rules of evidence.<sup>8</sup> Thus, it permitted reports on corridor gossip among law clerks, inquiries

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constitutional. Public dissatisfaction with the decision, indicated by several strong dissents, was ended after the decision was vacated in *People v. Tanner*, 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).

The timing of the *Tanner* decision, rather than the controversial holding, precipitated the accusations leveled against the California Supreme Court. On November 7, 1978, on the day of the retention election, stories circulated that the court had delayed the *Tanner* decision to prevent adverse reaction against Chief Justice Bird and three other justices. These reports asserted that the decision had not been announced despite the fact "that individual decisions were signed some time ago by all members of the court." See generally Greenburg, *Judicial Misadventures in California: A Response to Professor Tribe*, 65 ABA J. 1493, 1494 (1979).

4. Chief Justice Bird won retention by 51.7% of the vote, the narrowest margin for a judge in the state's history. See Tribe, *Trying California's Judges on Television: Open Government or Judicial Intimidation?*, 65 ABA J. 1175, 1176 (1979).

5. See Greenburg, *supra* note 3, at 1494.

6. See Tribe, *supra* note 4, at 1177. See also *Mosk v. Superior Court*, 25 Cal. 3d 474, 499, 601 P.2d 1030, 1048, 159 Cal. Rptr. 494, 512 (1979) (*en banc*), in which a special California Supreme Court held that new rule 902.5 of the California Rules of Court, authorizing a public investigation by the Commission, was unconstitutional in light of CAL. CONST. art. VI, § 18, sub. (f).

7. CAL. CONST. art. VI, § 18, sub. (f) states: "The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings." In *Mosk v. Superior Court*, 25 Cal. 3d 474, 601 P.2d 1030, 159 Cal. Rptr. 494 (1979) (*en banc*), the court concluded that a strong policy in favor of confidentiality and the absence of intent to change the former constitutional requirement of confidentiality, CAL. CONST., art. VI, § 10b, ¶ 3, precluded the Judicial Council from authorizing public investigations before the Commission. *Id.* at 499, 601 P.2d at 1048, 159 Cal. Rptr. at 512.

8. California Judicial Conduct Commission Resolution to amend the rules of evidence, adopted April 20, 1979, and introduced in the proceedings as Exhibit 660.

into intent, motivation, and speculation, and it welcomed the rankest type of hearsay as well as multiple hearsay evidence.<sup>9</sup>

In addition, the investigation broadened to irrelevant discussions of internal matters. Justices were called upon to discuss why their secretaries did not receive carpeting and why one justice would not speak to another justice unless a law clerk was present to take notes. Staff members were asked about conversations with newspaper reporters. Law clerks were grilled on why a particular footnote was inserted into an opinion. Justices were cross-examined as to why specific citations were included in their writings. Finally, every draft of an opinion, every intra-office memorandum, and all court records of an internal nature relating to a number of specific cases were subpoenaed and offered in evidence in public proceedings.

I had warned the Commission and its counsel several times that they were violating our state constitutional requirement of confidentiality,<sup>10</sup> but they chose to continue their investigation in public. I found the investigation so bizarre that my conscience dictated I compel compliance with the state constitution by means of a lawsuit.<sup>11</sup> My colleagues, though agreeing generally with my position, did not see fit to take similar action. Through a convoluted series of court proceedings<sup>12</sup> I was able to obtain the unanimous judgment of eleven appellate court justices that indeed the state constitution meant precisely what it said.<sup>13</sup> Therefore, the Judicial Council did not have the power to authorize public investigations

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9. For example, a law clerk witness was asked the following questions: "What did Justice A tell you that Justice B said to him during or after the court conference in which the case was discussed?" "What was the law clerk's demeanor when you asked him if his judge's opinion was politically motivated?" Questions by Commission members such as these were not uncommon.

10. In mid-June of 1978, I informed the Commission counsel that, if required to testify in public, I would challenge the constitutionality of the public hearing by filing a petition in the superior court. *See Mosk v. Superior Court*, 25 Cal. 3d 474, 500-01, 601 P.2d 1030, 1048, 159 Cal. Rptr. 494, 512 (1979) (*en banc*).

11. *Mosk v. Superior Court*, 25 Cal. 3d 474, 601 P.2d 1030, 159 Cal. Rptr. 494 (1979) (*en banc*).

12. The Courts of Appeal for the Second Appellate District granted my petition for a writ of mandate to compel the superior court to vacate its denial and to quash the Commission's subpoena directed at me. Before the court's decision became final, the Commission petitioned the California Supreme Court for relief. All the supreme court justices, except Associate Justice Newman, disqualified themselves from the case. Therefore, the Chief Justice assigned six courts of appeal justices, selected by lot, to act on the petition. *See Mosk v. Superior Court*, 25 Cal. 3d 474, 480, 601 P.2d 1030, 1034, 159 Cal. Rptr. 494, 498 (1979) (*en banc*).

13. *See note 7 supra*.

before the Commission on Judicial Performance, and I was not constitutionally required to testify at a public hearing before the Commission.<sup>14</sup> Commission hearings that had taken nearly five leisurely weeks in front of television cameras were thereupon concluded hastily in three days in private. The sport, the exhilaration of the hunt, the play-acting on center stage had been terminated.

The Commission ultimately issued a terse report declaring that there was no basis to proceed against any supreme court justice.<sup>15</sup> The hearings conducted by the Commission cost the taxpayers more than a half million dollars, including \$400,000 for the private counsel it hired.<sup>16</sup> I cannot question the expenditure of taxpayers' dollars for a reasonable investigation based on sound procedures. In this case, however, the Commission wasted both time and money by failing to exercise restraint before conducting proceedings. I would like to stress that the Commission's counsel took statements from every justice, and from countless law clerks and other persons, before undertaking its proceedings. Instead of evaluating this evidence to determine whether there was some reasonable basis to proceed, the Commission deemed itself compelled to plow the same investigative ground in public. The information the Commission members had before they donned their makeup for television performances was that there was no basis for charges against any member of the court. A half million dollars and a half year later they reached the same conclusion. What began with a loud media bang ended with an anticlimactic whimper.

There were both winners and losers in this profligate venture. The Commission members won. They received personal recognition and adulation from professional court detractors. Some members of the Commission counsel staff won. One assistant is now running for Congress on the strength of the attention he received. Finally, the newspaper, television, and radio media won. They received daily gossip stories with which to titillate their readers and listeners. The Supreme Court of California, despite the Commission's findings, was the big loser. A prestigious tribunal was now to be judged by the public on the basis of personality rather than ju-

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14. *Mosk v. Superior Court*, 25 Cal. 3d 474, 499, 601 P.2d 1030, 1048, 159 Cal. Rptr. 494, 512 (1979) (*en banc*).

15. CALIFORNIA JUDICIAL CONDUCT COMMISSION, REPORT OF COMMISSION ON JUDICIAL PERFORMANCE (Nov. 5, 1979).

16. I also employed private counsel for my litigation against the Commission, but my lawyers and their prestigious law firm contributed their extensive and successful legal work as pro bono service.

dicial product. And the public lost. When respect for the only peaceable dispute-resolving agency, the court system, is destroyed, our democratic processes as a whole are in jeopardy.<sup>17</sup>

The experience in California demonstrates clearly that once administrative agencies or any nonjudicial bodies are permitted to inquire into internal functions of the judiciary, absent articulable charges of corruption, the independence of the judiciary and its ability to function efficiently are gravely threatened. There is no more pathetic sight than learned judges cringing in fear of an aggressive investigative commission the members of which are pandering to the media.

California has often been an innovator in judicial reform and administration over the years.<sup>18</sup> The recent inquiry was also innovative, but it should be a warning to the bench and bar throughout the country. Judges cannot invite nonjudicial agencies to investigate the courts and still retain the freedom of conscience, independence, and courage implicit in the decisionmaking process. Some commentators postulate that judicial independence is an outmoded concept. Professor Raoul Berger, for example, suggests that it has become a fetish.<sup>19</sup> Others counter with the word "accountability."<sup>20</sup> In my opinion, there is ample accountability to the public for state judges who are corrupt, intemperate, or senile in the form of rejection by the electorate. If no election is impending, there are other responsible methods of proceeding, such as impeachment, proper inquiries by duly constituted commissions,<sup>21</sup> and recommendations to the state's highest court for discipline. The sanctions may take various forms including private censure, public censure, suspension, or removal.

Public hearings into internal court matters, however, create the potential for incalculable mischief. For example, a trial judge

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17. See Tribe, *supra* note 4, at 1179. See generally Kaufman, *Chilling Judicial Independence*, 88 YALE L. J. 681 (1979). *Contra*, Berger, "Chilling Judicial Independence": A Scarecrow, 64 CORNELL L. REV. 822 (1979); See also Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L. J. 1475 (1970).

18. Tribe, *supra* note 4, at 1176.

19. Berger, *supra* note 17, at 850. Professor Berger argues that "It is precisely this unremitting and unauthorized expansion of judicial governance that counsels us to reject the claim to 'absolute' independence. For uncircumscribed power is alien to our democratic system." *Id.*

20. See, e.g., Berkson & Tesitor, *Holding Federal Judges Accountable*, 61 JUDICATURE 442 (1978); Greenburg, *supra* note 3, at 1496.

21. See note 26 *infra*.

who grants probation to a convicted defendant, upon what the judge believes are adequate grounds, may find himself the victim of an attack by media commentators. If this results in the judge's being subject to a public inquiry into his beliefs, thought processes, discussions with staff, and conduct in similar cases, he may be induced in other cases to temper his judgment in the interest of avoiding public humiliation. The threat of people saying "he's soft on crime" could affect not only the timid or sensitive judge, but even a normally forthright judge.

Judicial independence suffers from that Damoclean sword. This is particularly so today when media commentators wield such extraordinary power. One who is irresponsible can, by a single thoughtless insinuation, reach millions of persons and instantly destroy, in the name of accountability, the career of a jurist who has devoted his lifetime to the law.

A logical question would be whether there has been any indication of an effect of the investigation upon judicial independence. I cannot breach the confidences of our court conferences, nor can I probe into the subjective fears of my colleagues. But in the scant few months since the Commission proceedings began, there have been some objective manifestations of judicial timidity. Fewer significant petitions for hearing have been granted, a drop of approximately thirty percent from 1978 to 1979.<sup>22</sup> And some justices are now more likely to disqualify themselves from sensitive cases on the most flimsy of purported ethical bases, rather than to face forthrightly the decisionmaking responsibility.<sup>23</sup>

In view of the post-Watergate syndrome, it is logical to question whether all hearings should be open or whether secrecy is per se suspicious. State lawmakers, by their actions, have appeared to give a negative answer. Washington has become the fiftieth state to create a judicial conduct commission.<sup>24</sup> Nevertheless, each state

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22. The supreme court granted 273 petitions during the 1977-78 term. JUDICIAL COUNCIL OF CALIFORNIA, STATE OF CALIFORNIA, 1979 JUDICIAL COUNCIL REPORT. Only 193 petitions were granted during the 1978-79 term. JUDICIAL COUNCIL OF CALIFORNIA, STATE OF CALIFORNIA, 1980 JUDICIAL COUNCIL REPORT.

23. The ABA Code of Judicial Conduct's liberal standard for disqualification permits a judge to decline cases when "his impartiality *might reasonably* be questioned. . . ." ABA CODE OF JUDICIAL CONDUCT, § 3(A) (1) (1976) (emphasis added).

24. The District of Columbia and Puerto Rico also have judicial conduct commissions. Most jurisdictions provide for confidentiality, at least until formal charges are preferred against a judge. See, e.g., CONN. GEN. LAWS ANN. §§ 51-51k, 51l (West Cum. Supp. 1980); MASS. GEN. LAWS ANN. ch. 211c §§ 1, 2 (West Cum. Supp. 1980). See generally *Conduct Commissions: The Process of Preserving Confidence in the Ju-*

provides for the confidentiality of proceedings, at least until formal charges are preferred against a judge.

The rationale for this respect for confidentiality was articulated by the *ad hoc* court<sup>25</sup> which heard my lawsuit in *Mosk v. Superior Court*.<sup>26</sup> The court declared:

The confidentiality of investigations and hearings by the Commission is based on sound public policy. Confidentiality encourages the filing of complaints and the willing participation of citizens and witnesses by providing protection against possible retaliation or recrimination . . . . Confidentiality protects judges from injury which might result from publication of unexamined and unwarranted complaints by disgruntled litigants or their attorneys . . . , or by political adversaries. Confidentiality of investigations by the Commission preserves confidence in the judiciary as an institution by avoiding premature announcement of groundless claims of judicial misconduct or disability. . . . Confidentiality of proceedings before the Commission is essential to protecting the judge's constitutional right to a private admonishment . . . , if the circumstances so warrant. When removal or retirement is justified by the charges, judges are more likely to resign or retire voluntarily without the necessity of a formal proceeding if the publicity that would accompany such a proceeding can thereby be avoided.<sup>27</sup>

The United States Supreme Court has reached the same conclusions.<sup>28</sup>

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*diciary*, 63 JUDICATURE 204-50 (1979); Note, *State Judiciary Disciplinary Commissions and Proceedings: Developing Administrative and Legal Standards for Evaluating Judicial Misconduct*, 10 RUTGERS CAMDEN L.J. 685 (1979); Comment, *The Procedures of Judicial Discipline*, 59 MARQ. L. REV. 190 (1976). For extensive analysis of judicial conduct commissions in Illinois, New Jersey, New York, and California, see Braithwaite, *Judicial Misconduct and How Four States Deal With It*, 35 LAW & CONTEMP. PROB. 151 (1970).

25. See note 12 *supra*.

26. 25 Cal. 3d 474, 601 P.2d 1030, 159 Cal. Rptr. 494 (1979) (*en banc*).

27. *Id.* at 491, 601 P.2d at 1041-42, 159 Cal. Rptr. at 505-06 (citations omitted).

28. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 898 (1978). Un-  
ease in this area is not limited to state courts. The federal Judicial Conduct and Dis-  
ability Act of 1979, S. 1873 [added to S. 1477], 96th Cong., 1st Sess., 125 CONG. REC.  
S15,435 (daily ed. Oct. 30, 1979), has passed the Senate and is now awaiting House ap-  
proval. The merit of the proposal is that it places responsibility for resolution of inter-  
nal judicial problems with the 11 judicial councils. Sanctions short of dismissal are  
authorized, with impeachment the only vehicle for removal. The Act also urges "in-  
formal, collegial resolution" of disability and disciplinary matters. For a favorable in-  
depth analysis of the proposed legislation, see Kaufman, *supra* note 17. *Contra*  
Berger, *supra* note 17.

I mentioned at the outset that California courts are likely to return to page one. The reason is that organized conservative court probers tasted blood last year, and they are poised for the kill this time out. This is not outrageous hyperbole. A group known as the Law and Order Campaign Committee,<sup>29</sup> financed largely by gun lobby money, is organized in metropolitan areas for the purpose of rating judges on their performances. Included are such inquiries as how judges stand on the death penalty or how many defendants they sentence to prison. The Committee will support campaign opponents for those judges whose replies to these and similar questions are not deemed satisfactory. In addition, the group is sponsoring legislation to compel an indexing of judges' criminal sentencing. Thus, they advocate a box score on at-bats, hits, and errors, as if the fate of human beings can be equated with a pitcher's curves and sliders. Qualities of a good judge such as impartiality, intelligence, independence, and integrity to do what the law requires regardless of personal consequences are to be disregarded. The new standard by which judges are to be measured is how often they reach certain results rather than how objectively they dispense justice based on individual facts.

On a state-wide basis, the Law and Order Committee is circulating an initiative measure to abolish our long-standing Missouri plan<sup>30</sup> of retaining or rejecting appellate court justices on a yes-no vote, a program which has been widely accepted as enhancing the quality and independence of the higher courts,<sup>31</sup> and to substitute therefor the typical anachronistic political method of having candidate opposition for every justice on shortened terms. The executive director of the so-called Law and Order group has explained its position with a rare economy of words: "All we are asking for is a responsible and accountable judiciary." Translated from the general to the specific, this means that conservatives want judges who agree with them.

Referring to the state supreme court justices, the group's di-

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29. The Law and Order Campaign Committee produced two dramatic and possibly unfair television commercials on rape and busing issues designed to discredit Chief Justice Bird. Most stations, however, refused to air these commercials. See NEWSWEEK, Oct. 23, 1978, at 53.

30. CAL. CONST. art. VI, § 26. See Smith, *The California Method of Selecting Judges*, 3 STAN. L. REV. 571 (1951).

31. See R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* (1969). *Contra*, Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509 (1978).

rector said, "They have become isolated in their power. They are accountable to virtually no one for their acts. They can make decisions in secrecy and enforce them." This view raises some interesting and disturbing questions. To whom should the justices be accountable? To the media? To the governor? To the Law and Order Committee? Should their deliberations, unlike those of a jury, not be secret? Should their decisions not be enforced? Should the justices be put in a position in which they are forced to keep an eye on the popular opinion of the moment? Are we ready for Soviet-like people's tribunals?

I hope the answer to that last query is in the negative, that we do not want judges or justices, at any level of the judiciary, dependent upon political fortunes and therefore prisoners of the public whim.<sup>32</sup> It is tantalizing rhetoric when simplistic commentators insist that judges, like legislators and executives, should be responsive to the public will. I suggest to you that their roles are not comparable. While legislators and executives are chosen to represent and further the public consensus, judges must have the fortitude to stand against public opinion when necessary to achieve justice under the Constitution.<sup>33</sup>

In the *Federalist Papers*,<sup>34</sup> Alexander Hamilton and James Madison expressed their belief that the judiciary, unlike the executive and the legislative branches, should be above the fray, impervious to the shifting political winds. There have been attempts to disregard these words. Franklin Roosevelt railed against the conservative "Nine Old Men" and proposed to pack the Supreme Court. He failed. The John Birch Society railed against the liberal

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32. Professor Tribe explains:

It is impossible to avoid the conclusion that the pending inquiry, far from being a reasoned response to real evidence of abuse, would never have been initiated if the anticipated ruling in *Tanner* had been a popular one—if the court had been suspected of procedural misconduct but not of nullifying a widely approved law-and-order measure. The ongoing investigation is thus punishment for an unpopular result—Gallup Poll justice at its worst.

Tribe, *supra* note 4, at 1178.

33. Justice Frankfurter's concurring opinion in *Dennis v. United States*, 341 U.S. 494 (1951), provides additional support. He states:

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. . . . Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures.

*Id.* at 525 (Frankfurter, J., concurring).

34. See *THE FEDERALIST NO. 78* (A. Hamilton) (Mod. Lib. ed. 1937).

Warren Court and called for impeachment of Earl Warren. It failed. I wish I could be certain that the current efforts to demean the judiciary also would fail. There was an old saying that the gods take care of children, drunks, and the supreme court. I regret that in this age of cynicism about all government I am no longer confident of that protection, nor am I sanguine about the future.